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IN THE

Supreme Court of the United States

October Term, 1948

Docket No. 621

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL MILLS, INC. AND MONTANA FLOUR MILLS COMPANY,
Appellees.

REPLY TO MOTION TO AFFIRM

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INDEX

	Page
Statement	2
Argument	7
I. Appellees' Motion Assumes the Validity of Commission's Declarations which are Contrary to the Record and are Challenged by this Appeal	7
II. There are No Through Interstate Routes Via Butte from the Montana Triangle to California Open at "Combination Rates" (as that Term is Properly Used in Virginian Ry. Co. v. U. S., 272 U. S. 658, 668) for Shipments Stored or Milled at Great Falls	10
III. The Transit Ordered is not a Regulation "Incidental" to the Operation of Existing Routes Open at Joint Rates for Continuous Shipments	15
IV. As Literally Worded, the Order is Void	23
Conclusion	24
Affidavit of Service	25
Appendix 1 ..... follows page	25

CITATIONS

Cases:

Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134	11
A. T. & S. F. Ry. Co. v. U. S., 279 U. S. 768	20
B. & O. S. W. RR. Co v. Settle, 260 U. S. 166	12, 17, 21
Board of Trade of Kansas City v. U. S., 314 U. S. 534	12, 17
Burrus Feed Mills v. A. T. & S. F. Ry. Co., 231 I. C. C. 153	5
Carson Petroleum Co. v. Vial, 279 U. S. 95	12, 21

Central RR. Co. of New Jersey v. U. S., 257 U. S. 247 ..... 19, 20, 21
Coffeyville Vitrified Brick & Tile Co. v. St. Louis & San Francisco RR. Co., et al, 25 I. C. C. 101 4
Cotton from Texas to Texas Ports, 191 I. C. C. 388 4
Dean Mill Company v. Missouri Pacific RR. Co., 80 I. C. C. 174 5
General Mills v. Great Northern Ry. Co., 269 I. C. C. 457 ..... 5, 11
Globe Grain & Milling Co. v. A. T. & S. F. Ry. Co., 142 I. C. C. 391 5
Goddard Realty Co. v. New York, C. & St. L. R. Co., 229 I. C. C. 497 18
Grain Case Modifications, 229 I. C. C. 9 ..... 16, 17
Grain & Grain Products, 205 I. C. C. 301 4
Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538 9
New York v. United States, et al, 331 U. S. 284..... 19
Pennsylvania RR. Co. v. U. S., 323 U. S. 588 ..... 2, 22
Ryan Co. v. Chicago, St. P. M. & O. Co., 174 I. C. C. 665 4
St. Louis S. W. Ry. Co. v. U. S., 245 U. S. 136 ..... 6, 12, 13
Scoular-Bishop Grain Co. v. M. & St. L. R. Co., 200 I. C. C. 663 11
Smith & Scott v. A. T. & S. F. Ry. Co., 185 I. C. C. 381 5
Texas & New Orleans RR. v. Sabine Tram Co., 227 U. S. 111 ..... 12, 21
Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 17
Texas Steel Company v. Missouri-Kansas-Texas RR. Co., 225 I. C. C. 337 2
Through Routes and Through Rates, 12 I. C. C. 164 ..13, 15
Transit Restrictions on Wine to Eastern Territory, 222 I. C. C. 45 5

BLEED THROUGH – POOR COPY

U. S. v. Capital Transit, 325 U. S. 357 12
U. S. v. Idaho, 298 U. S. 105 9
Virginian Ry. Co. v. U. S., 272 U. S. 658.....6, 10, 13, 15
Western Pacific RR. Co. v. N. W. Pac. RR. Co., 191 I. C. C. 127 19
Wray Goodwin, Inc. v. Southern Ry. Co., 268 I. C. C. 765 11

Statutes:

Interstate Commerce Act, 49 U. S. C. 1 et seq.:
Section 1 .....17, 19
Section 1(4) 18, 19
Section 1(5) 19
Section 1(6) 18, 19
Section 3 19
Section 6(1) 14
Section 6(7) 14
Section 13(3) 23
Section 15(1) 8, 15, 19
Section 15(3) 6, 7, 8, 15, 18, 19, 20, 22
Section 15(4) 6, 7, 8, 15, 18, 19, 20, 22
Section 15(8) 13

Miscellaneous:

Locklin's "Economics of Transportation" (1947), p. 869 12
Merriam's Webster's New Internationary Dictionary, Second Edition, Unabridged (1941) 17

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Appellees.

REPLY TO MOTION TO AFFIRM

Appellant, pursuant to Rule 12, paragraph 3, and Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, submits this reply to the motion of appellees United States of America and Interstate Commerce Commission[1], served February 16, 1949, that the judgment of the District Court be affirmed.

[1]The motion is signed by counsel for the United States and the Interstate Commerce Commission only and not by counsel for the remaining appellees.

STATEMENT

As appellees indicate, this appeal is from a final judgment dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission requiring appellant to establish a certain transit privilege[2] at Great Falls, Montana.[3]

The transit ordered would permit carloads of wheat delivered to appellant at stations in the "Montana Triangle" (shown on Appendix 1), shipped to Great Falls, Montana, on an intrastate bill of lading, there delivered, unloaded and stored in elevators or milled into flour or other products, to be connected with subsequent shipments from Great Falls, of wheat or products, to destinations in California and Nevada *via routes through Butte, Montana,* under an arrangement whereby, fictionally, the two separated shipments, into and out of Great Falls, would be treated as one continuous movement and at rates applicable to continuous through shipments. Routes through Butte short haul[4] the appellant on such shipments, for it already participates in numerous other routes from Triangle stations to California and Ne-

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[2] In *Texas Steel Company vs. Missouri-Kansas-Texas RR. Co.*, 225 I. C. C. 337, 339, the Commission defined transit as

"the stopping of a commodity for processing or other purposes, and the forwarding of the same, or an equivalent, *under an arrangement which by legal fiction, ties the inbound and outbound movements together so as to create what, before the law, is a continuous through movement and not two separate movements.*" (Emphasis supplied.)

Other explanations appear in footnote 3 of appellees' motion.

[3] In addition to the terms of the order quoted in footnote 2 of appellees' motion, the order incorporated by reference the Commission's accompanying report at 269 I. C. C. 457, which concluded as follows:

"An order requiring the establishment of transit arrangements found reasonable will be entered."

[4] I. e., require appellant to turn this traffic over to a connecting line without having received its maximum haul between origin and destination. See *Pennsylvania RR. Co. v. U. S.*, 323 U. S. 588.

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vada[5] through Great Falls for the transportation of wheat and wheat products which allow it a greater portion of the total haul. The latter routes extend through any one of several junctions between appellant's railroad and connecting railroads in Washington, Oregon, and northern California (Appendix 1). Appellant has established transit at Great Falls available in connection with Triangle shipments routed via these western junctions to California but since the transit privilege itself does not extend to shipments routed via Butte any shipments of wheat or flour from Great Falls via Butte, if made, would be not only physically separate from any prior rail carriage into Great Falls but would also be contractually distinct (Commission's Tr. p. 120).[6]

The presently applicable rates for the movement from the Triangle into Great Falls on wheat which is there delivered and which does not move out under an existing transit privilege are intrastate, for the haul is entirely within Montana. These intrastate rates differ in amount from the local interstate rates from Triangle origins to Great Falls which are used in constructing "combination rates" for through interstate movements to out of state destinations (Commis-

[5]For convenience the destination territory is hereafter referred to as California, since that is the area principally involved.

[6]Parenthetical references are to pages in the transcript of testimony taken by the Commission and to exhibits received by the Commission, all of which were incorporated in Petitioner's Exhibit 1, received by the District Court.

sion's Tr. pp. 115, 120, 125, 126; Commission's Exhibit 1, p. 19).[7]

There is a joint interstate rate of 68 cents per cwt.[8] applicable on wheat and wheat products shipped from a large area in Montana (which includes not only Great Falls and the entire Triangle but many more grain shipping stations) to California either via the western junctions of the appellant (Portland, Oregon, for example) or via Butte. This rate was directed by the Commission on shipments via Butte in *Grain and Grain Products,* 205 I.C.C. 301, at the request of "mills at Ogden and in southern Idaho" who wished to draw Montana wheat "for blending purposes," (see p. 449 of that decision) though the Montana millers (including both millers involved in the present controversy) then opposed opening the Butte routes for shipments of grain from Montana. (Commission's Ex. 5; Commission's Tr. p. 259). The Commission in that proceeding did not, however, order transit to be granted in connection with any specific movements, or at particular locations, but on the contrary expressly stated that it would not disturb "the carriers' present exercise of judgment as to the necessity for transit in specific instances,"

[7]Rates restricted to intrastate transportation may not be used to make up a combination rate applicable on a through interstate movement (*Ryan Co. vs. Chicago, St. P. M. & O. Co.*, 174 I. C. C. 665) and where there are two local rates, one for interstate application and one for intrastate application, only the former may be used to construct interstate combination rates. *Coffeyville Vitrified Brick & Tile Company v. St. Louis & San Francisco RR. Co., et al,* 25 I. C. C. 101, 102. In *Cotton from Texas to Texas Ports,* 191 I. C. C. 388, the Commission said:

"It is common practice for interstate rates to be published for application between two points in a single State, where the transportation between such points is wholly within the boundaries of that state, but by various means such, for instance, as transit arrangements, the transportation which to all appearances, is intrastate, is linked with transportation from or to points in other States, or foreign countries, in such manner as to render the through movement, including that between the two points in one State, subject to our jurisdiction."

[8]The rate was increased after the evidence in the record was prepared. For convenience, it is here described as the 68 cent rate.

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which, it said, "will continue to be governed by the facts presented to the carriers."[9] Appellant and other Montana lines thereafter continued their long standing practice of granting transit at intermediate Montana milling points where shipments from the milling point were routed through western junctions but felt no requirement to establish transit so as to permit shipments from said milling points to be routed via Butte as transit tonnage, which would short haul them, and did not do so.[10]

There are out-of-line hauls to Great Falls which occur in connection with routes from *a portion* of the Triangle to California through western junctions and where such hauls occur out-of-line charges have been assessed in addition to the 68 cent rate. Such out-of-line charges would not be applicable were the Butte routes opened for Triangle shipments stored or milled at Great Falls. On facts not material to this motion appellant contended before the Commission, among other things, that the millers and merchandisers at Great Falls had certain advantages by reason of the liberal terms of the transit presently accorded them which prevented these out-of-line charges from working an actual prejudice.

[9]See the Commission's report in the instant case, *General Mills, v. Great Northern Ry. Co.*, 269 I. C. C. 457, at pp. 468-9; *Burrus Feed Mills vs. A. T. & S. F. Ry. Co.*, 231 I. C. C. 153, 160. "A *maximum* of two free stops in transit" was permitted and "transits to the number of two *when granted*" were required to be "without separate charge". (Emphasis ours, idem.)

[10]In the past the Commission had approved transit limitations to maximum haul routes in similar situations involving joint rates on grain (*Dean Mill Company v. Missouri Pacific R. Co.*, 80 I. C. C. 174, 177; *Globe Grain & Milling Co. v. A. T. & S. F. Ry. Co.*, 142 I. C. C. 391, 392; *Smith & Scott v. A. T. & S. F. Ry. Co.*, 185 I. C. C. 381, 385) as well as other commodities (*Transit Restrictions on Wine to Eastern Territory*, 222 I. C. C. 45). The Northern Pacific and Milwaukee Railroads followed the same course as appellant and still limit transit on Montana grain destined to California to their long haul routes. (Com. Ex. 9; Com. Tr. pp. 281-287). The Southern Pacific, a California connection of appellant, has likewise restricted transit for a similar reason in certain instances (Com. Tr. p. 167).

The Commission found, however, that appellant's failure to establish transit at Great Falls in connection with shipments which might move through Butte was unreasonable and unduly prejudicial and it is on that ultimate finding that its order rests.

Appellant contends that the Commission's order is invalid for four reasons: (1) as creating through routes[11] via Butte for wheat stored or milled at Great Falls though the issue of new through routes was neither pleaded nor litigated under Section 15 (3)[12] of the Interstate Commerce Act and though no findings under that section were made,[13] (2) as creating routes short hauling appellant without its consent without findings under Section 15(4),[14] and in complete disregard thereof, (3) as an assumption by the Commission of

[11]The Interstate Commerce Act contains no definition of a through route. A definition taken from an early Commission decision is found in a footnote in *St. Louis S. W. Ry. Co. vs. U. S.*, 245 U. S. 136, as follows:

"A 'through route' is an arrangement, express or implied, between connecting railroads *for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another.*" (Emphasis supplied.)

[12]*49 U.S.C., Sec. 15(3)* reading as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes * * *."

[13]In *Virginian Ry. Co. v. U. S.*, 272 U. S. 658, 666, it was stated that the absence of a finding of public necessity or desirability under Section 15(3) voids an order creating through routes.

[14]*49 U.S.C., Sec. 15(4)* reading as follows:

"In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * *"

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jurisdiction over intrastate commerce without complying with statutory prerequisites for such assumption, and (4) because even if this case had been pleaded and litigated and findings had been made under Sections 15(3) and 15(4) (which is not the case), the evidence would not support such findings or any order creating through routes for such traffic short hauling appellant.

ARGUMENT

I.

Appellees' Motion Assumes the Validity of Commission's Declarations Which are Contrary to the Record and are Challenged by this Appeal.

The gist of the argument for affirmance is this: that through routes via Butte are now open at joint rates on shipments of wheat and wheat products from the "Montana Triangle" moving to California not stored or milled at Great Falls; that millers and merchandisers of wheat at that point are "precluded from use of these routes because of high combination rates resulting from the denial of transit" at Great Falls; that "the most cursory consideration of the terms of the Commission's order" indicates that it "does not direct appellant to establish a new through route" but merely a transit privilege "in connection with 'the present joint rates from and to the same points over the same routes' which appellant now maintains via Butte" on shipments not stopped in transit; and that such a transit privilege is merely a reasonable rule or regulation incidental to the lawful operation of an existing route which the Commission, acting under

powers granted by Section 15(1) to correct unreasonable and prejudicial rates and practices, has ample authority to require without making findings under Sections 15(3) and 15(4).

In effect, this is a restatement of the Commission's justification, stated in its report, for the order that it made, a justification which appellant contends was erroneously accepted by the District Court. Except as to appellee's comment as to what is revealed by "the most cursory consideration of" the literal "terms of the * * * order" (which is dealt with later herein), that justification and appellee's whole argument both rest—and in substance are stated by appellees to rest—upon two basic preliminary declarations of the Commission, either one of which must be valid to give that justification and appellees' argument effect. The first declaration is that the Butte routes are now open at "high combination" rates for the traffic here involved (that is, for shipments originating in the Triangle, delivered at Great Falls, there stored or milled, and thence shipped to California); the second is that the transit ordered is merely a regulation "incidental" to the lawful operation of the existing routes now open on shipments of wheat or wheat products moving straight through.

This suit, however, is not merely a test to determine whether the Commission's declarations, stated in the report, support its own ultimate findings and order. And appellant here does not ask the Court to determine the validity of the order, the substance of which is apparent only by considering its terms in connection with the facts on which it must operate, merely "by the most cursory consideration."

On the contrary appellant directly challenges both of the declarations of the Commission on which it justifies its order

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and on which appellees rely and directly challenges also the validity of the order. This challenge rests primarily not on declarations or "findings" contained in the Commission's report nor on the literal terms of the order, *but on incontrovertible facts conclusive in the record but not readily apparent from the report and order.* And in support of its case, of course, appellant has brought to this Court not merely the Commission's report but the entire record.

A declaration by the Commission either that a through route exists for certain traffic or that the effect of its order is simply the prescription of a regulation or practice "incidental" to the operation of an existing route involves the determination of mixed questions of law and fact.[15] Many years ago this Court said, upon sustaining a lower court in setting aside a Commission finding concerning the existence of a satisfactory through route and an order based thereon:

> "* * * the existence of such route may be inquired into by the courts, *notwithstanding a finding by the Commission.* * * * In the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not or would not have made the type of declaration in their order [as to the existence of such a route] * * * *but for a view of the law upon which this court must pass.*"
>
> (Holmes, J., in *Interstate Commerce Commission v. Nor. Pac. Ry.*, 216 U. S. 538, emphasis supplied.)

So here, under indisputable facts clear from the record itself but not from the Commission's report, appellant contends that the Commission could not have made either of the basic declarations upon which appellees' motion is based "but for a view of the law" which appellants here challenge and upon which, in this appeal, we ask the Court to pass.

[15]Many such questions arise under the Act. See for example *U. S. v. Idaho*, 298 U. S. 105.

II.

There are No Through Interstate Routes Via Butte From the Montana Triangle to California Open at "Combination Rates" (As That Term is Properly Used in Virginian Ry. Co. vs. U. S., 272 U. S. 658, 668) For Shipments Stored or Milled at Great Falls.

The statement in the caption is based upon the following indisputable facts:

(a) Wheat shipped to Great Falls from the Triangle and other Montana origins after delivery at Great Falls to the consignee is either stored there in elevators and "loses its identity," or is milled into unidentifiable flour or wheat products (Com. Tr. p. 69). Some of it (about 10 per cent) is then distributed at Great Falls or within Montana (Com. Tr. pp. 31-33, 220, 340-341), a large part of it goes to Duluth, Minneapolis, the North Pacific Coast, or other points, and a much smaller part finally goes to California (Com. Tr. pp. 22, 71, 152; Com. Ex. I, pp. 48 to 50).

(b) Any outbound shipment of wheat or wheat products from Great Falls to California *via Butte* must presently be made on a new bill of lading containing no reference to the inbound movement; that is, under an entirely separate contract of carriage, "for the reason," frankly stated at the Commission's hearing without contradiction *by a witness for the complaining miller,* "that no transit is permitted at Great Falls [in connection with the Butte routes]; therefore the reshipment from that transit point is a local shipment and no inbound transit billing is applied on the outbound movement" (Com. Tr. p. 120).[16]

[16]See footnote 2, *supra.*

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(c) "The *intrastate* rates from origin to Great Falls" now apply to a shipment of wheat or products from the Triangle to Great Falls even though subsequently a separate interstate outbound shipment of the same commodity or products thereof may be made from Great Falls to California. On this the complaining miller (Com. Tr. p. 120) and appellant's witness (Com. Tr. pp. 310-311) both agree. This fact was inferentially determined also by the Commission,[17] for in its report it adopts the complaining miller's computation of the total charge from Chester, Montana, (a Triangle origin) to Los Angeles, California, on two shipments of wheat, the first being delivered at Great Falls for storage or milling and the second being shipped out from Great Falls to Los Angeles, as being 90c per cwt., (see 269 I.C.C. at p. 460), or the aggregate of the 22c intrastate rate from Chester to Great Falls (Com. Ex. 1, p. 19) and the 68c interstate rate from Great Falls to Los Angeles rather than as being an "interstate combination rate" of 91 cents, which would be produced if it were proper to add the 23 cent interstate local rate from Chester to Great Falls (Com. Ex. 1, p. 19) to the outbound 68¢ interstate charge.[18]

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[17]The Commission could hardly have determined otherwise in view of *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, holding that even though 95% of the products of certain rough materials processed at a particular milling point in the state of their origin actually moved outside the state "so that this entered into the purpose of the parties when shipping the rough material to the mill," this circumstance "did not alter the character" of the initial movement, which was at an end at the mill and therefore remained intrastate so that a state and not an interstate tariff applied and in view of its own decisions in *Scoular-Bishop Grain Co. v. M. & St. L. R. Co.*, 200 I. C. C. 663, and *Wray Goodwin, Inc. v. Southern Ry. Co.*, 268 I. C. C. 765. In the latter case it said:

> "There being no definite intention at the time of original shipment to forward these particular shipments to interstate destinations, and there being no transit arrangement in effect, the inbound movements * * * were intrastate and not within the jurisdiction of this Commission."

[18]See footnote 7, *supra*.

(d) There was no testimony that even as much as a single car of wheat or wheat flour had ever been shipped from Great Falls to California via Butte.

The circumstance that the shipments are far from continuous in physical fact,[19] coupled with the fact that there is no actual flow of Triangle wheat shipped from Great Falls via Butte, and that there can be no intent at Triangle origin to ship beyond Great Falls to any particular interstate destination tonnage which "loses its identity" at Great Falls and may there be disposed of distinguish the situation here from *U. S. vs. Capital Transit,* 325 U. S. 357, and earlier leading cases like *Texas and New Orleans R. R. Co. vs. Sabine Tram Company,* 227 U.S. 111; *Baltimore & Ohio Southwestern R. R. Co. vs. Settle,* 260 U.S. 166; and *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, where, one or more of these circumstances being present, it could be said that certain movements, considered together, were interstate in their entirety. The complete break in physical continuity with no contractual arrangement for bridging the gap, even fictionally, would also seem to be conclusive that no through routes via Butte presently exist under the definition of that term quoted in *St. Louis South Western Ry. Co. vs. United States, supra,*[20]

The intervening custody of the consignee at Great Falls and the necessity for new billing combine to leave this situation outside the concept of a through route under the definition in Locklin's "Economics of Transportation"[21] (1947), where it is said at page 869:

[19]The interval between the shipments to and from Great Falls under the transit privilege sought in this case could be as long as two years (Com. Tr. p. 305).

[20]See footnote 11, *supra.*

[21]Cited in *Board of Trade of Kansas City v. United States,* 314 U. S. 534, 538.

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> "By a 'through route' we mean an arrangement between connecting carriers for the continuous carriage of goods *on a single billing* from a point on the lines of one carrier to a point on another." (Emphasis supplied.)

And loss of the carrier's custody at Great Falls and the consequent necessity for a new bill of lading at that point make it impossible at the point of original shipment to comply with Section 15(8)[22] of the Interstate Commerce Act making it mandatory for carriers by railroad to issue a "through bill of lading" whenever a shipment is tendered for transportation over an established "through route."

In an early and controlling Commission decision on through routes and through rates cited with approval many times in leading decisions of the Supreme Court,[23] *Through Routes and Through Rates,* 12 I. C. C. 164, it is said with respect to a through route:

> *"The route being one, a charge for a service over it is a charge for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service.* The rate is either a joint through rate made by arrangement by the parties to the through route, or it is a combination through rate consisting of 'the separately established rates, fares, and charges applied to the through transportation.' *This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed."* (Emphasis ours.)

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[22] 49 U.S.C., Sec. 15(8).

[23] For example, *St. Louis S. W. Ry. Co. v. U. S., supra, and Virginian Ry. Co. v. U. S. supra.*

If a through route implies "a charge for a single service" which is "either a joint through rate" or "a combination through rate," the indisputable fact, present here, that a separate intrastate rate is applicable for the first separate movement is itself evidence that a through interstate route (or "arrangement for continuous carriage," as defined in footnote 11, supra) does not exist as to shipments stopped at Great Falls. If a through interstate route did exist the total charge for service over it, being a charge for a single service, would have to be comprised entirely of interstate (rather than intrastate) local rates as factors, not only under the decision quoted, but under Section 6, Subdivision 1, of the Interstate Commerce Act, which requires carriers to file with the Commission "the separately established rates * * * applied to the through transportation" and Section 6(7) which requires such interstate rates to be observed in connection with interstate movements.[24]

In these circumstances the Commission's declaration accepted by the District Court and adopted by appellees in support of their motion to affirm that "the Butte routes are offered to the shippers as available routes but high combination rates on traffic transited at Great Falls keep them closed commercially for such traffic" is clearly erroneous and out of harmony with other portions of its report.[25] It is apparent that the Commission's declaration relied on by appellees, would not have been made "but for a view of the law" in which appellant cannot acquiesce and upon which this Court is asked to pass.

[24]49 U.S.C. 6(1) and 6(7). But the use of interstate "local rates" as factors in any through combination rate was here properly conceded by the parties and determined by the Commission to be improper. See footnotes 7, 17 and 18, *supra*.

[25]See text preceding footnotes 17 and 18, supra.

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The *Virginian case,* 272 U.S. 658, 666-67, relied on by appellees, simply sustains the Commission's jurisdiction to pass upon the lawfulness of a combination through rate made up of separately established local interstate rates applied to through transportation under Section 15(1) without regard to Sections 15(3) and 15(4). It adopts the Commission's definition of a through route in *Through Routes and Through Rates, supra.* Clearly it cannot sustain the contention that a through route exists for traffic milled or stored at Great Falls. The "combination rate" involved in the *Virginian case* applied to movements of coal which were continuous in physical fact, the sum or combination of the local interstate rates being available "as a single rate for a single service". The shipments of coal were not stopped in transit, did not lose their identity while out of the carrier's custody, no new bills of lading were issued at intermediate points, and there was certainly no lack of intent at initiation of the movement to ship any particular lot of coal to an interstate destination. In other words, none of the facts which are controlling here was present there.

III.

The Transit Ordered is Not a Regulation "Incidental" to the Operation of Existing Routes Open at Joint Rates on Continuous Shipments.

Physically, the railroad operations of appellant covered by the existing joint rates are completely different from those which would take place if transit were accorded. Now, under the joint rate, wheat moves in single, heavily-loaded cars from Triangle origins via Great Falls for interchange at Butte without interruption. In connection with that move-

ment appellant performs but one complete terminal service (in originating the car) and one partial terminal service (in interchanging the car with its connection at Butte). The transit operation would involve two additional, complete terminal services at Great Falls—(1) the delivery of an inbound car and (2) the origination of an outbound car—each involving expensive switching and loss of car days. Since wheat loads much more heavily than flour, the transit sought would also involve the furnishing of a substantially greater number of cars for flour movement, 1.52 cars for each car of wheat (Com. Ex. 11, Com. Tr. p. 296). Appellant naturally objects to the assumption of this burdensome service and the furnishing of extra cars to go off its line in connection with the much smaller proportion of the total haul it would receive from the Triangle to Butte—a weighted average haul of 231 miles (Com. Ex. 3, p. 9) compared with hauls to western junctions ranging up to over 1200 miles (Com. Ex. 8, p 3)—which would deprive it of substantial revenues on traffic it originates, even though appellant willingly assumes that burden in connection with routes according it its maximum haul.[26]

Subdivision I of the Argument shows that contractually and legally the transportation via Butte of continuous shipments at joint rates is essentially different from the transportation of wheat milled or stored at Great Falls and shipped from there via Butte. The absence of transit has not interfered with the legal operation of the Butte routes on continuous shipments, which routes were in effect for a decade before the complaint in the instant case was filed with the Commission.[27]

[26]Transit was recognized as "an additional burden upon the carriers" in *Grain Case Modifications*, 229 I. C. C. 9. For a discussion of Commission cases involving the propriety of limiting transit to routes according the carrier granting transit its maximum haul, see footnote 10, supra.

[27]July 1, 1935 to March 27, 1946.

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"Incidental" means "happening as a chance or undesigned feature of something else; casual, hence, not of prime concern; subordinate. (Merriam's Webster's New International Dictionary, Second Edition, Unabridged (1941)). To say that transit is "incidental" to the operation of the existing through routes on uninterrupted movements is a perversion of language and contrary to the fact. As a matter of fact the Commission itself, though it has not hesitated to regulate transit when voluntarily granted, has in the past been extremely reluctant to issue a mandatory order compelling it. In *Grain Case Modifications,* 229 I. C. C. 9 (sustained in this Court in *Board of Trade of Kansas City v. United States, supra*), the Commission, in declining to make such an order, said at page 12:

> "In the past we have been loath to order transit under Section 1, and have done so only in exceptional instances, and in respect to limited adjustments."

Undoubtedly this reluctance to make such an order, particularly in cases where the issue of through routes was not before it, has been the result of expressions of this Court in cases like *B. & O. S. W. RR. Co., v. Settle,* 260 U. S. 166, where it was said in a footnote at pp. 173-4:

> *"There are many instances when the grant by tariffs of extensive transit or reconsignment privileges have rendered what otherwise would be independent local movements a part of the through interstate movements."* (Emphasis supplied.)

The provisions of the Interstate Commerce Act are in *pari materia* and should be construed in harmony with each other. As this Court said in *Texas and Pacific Ry. Co. vs. Abilene Cotton Oil Co.,* 204 U. S. 426, 446, one provision of

the Act may not be construed so as to defeat another and the Act cannot be held to destroy itself. In *Joseph A. Goddard Realty Co. vs. New York C. & St. L. R. Co.*, 229 I. C. C. 497, where the Commission was asked to condemn as an unreasonable practice in violation of Section 1 (6) petitioner's failure to name certain industries in its tariff as entitled to receive certain switching and where the effect of the order sought under that Section would be to short haul defendant and permit the use of its line only for switching, the Commission said, at page 503:

> "* * * In other words, we are asked to do under section 1 that which under section 15(4) we are directly prohibited from doing. *The provisions of one section of the act must be considered in the light of other provisions of the act which may have a bearing thereon.*" (Emphasis supplied.)

Of course any other construction of the Act—that is one which would permit the creation of through routes and the short hauling of a carrier on important traffic in violation of its statutory rights by the simple expedient of picking words like "incidental," or of using labels and ignoring facts—would render Sections 15(3) and 15(4) entirely nugatory.

Appellant does not claim that the Commission would not have had authority to make the order which it did in a case properly pleaded and litigated under Sections 1(4),[28] 15(3) and 15(4). It claims merely that prescription of a transit privilege, which has the effect of permitting shipments to be joined together in a new through route, requires that the

[28] 49 U. S. C., Sec. 1 (4), not pleaded or litigated here and reading as follows:

> "It shall be the duty of every common carrier subject to this part to * * * establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *."

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case be made under those sections and that those sections be construed together.

It is claimed by appellees, however, that this Court's decisions in *New York v. United States* (the *Class Rate Case*), 331 U. S. 284, and *Central RR. Co. of New Jersey v. U. S.*, 257 U. S. 247, 257, sustain the Commission's authority under Section 15(1) to require transit as a regulation incident to an existing route under Sections 1 (5), 1 (6) and 3 without regard to the sections mentioned. *New York v. U. S.*, however, did not involve transit. In the *Central of New Jersey* case this court had under consideration a decision of the Commission holding that the failure to grant a particular transit privilege on forest products was unduly prejudicial under Section 3 of the Interstate Commerce Act. The Court held that the finding of undue prejudice under that section could not be sustained and then said, by way of *obiter dictum:*

> "The Commission clearly has power under Sec. 1 of the Act to Regulate Commerce as amended to determine whether in a particular case a transit privilege should be granted or should be withdrawn. For that section requires, among other things, that carriers establish, in connection with through routes and joint rates, reasonable rules and regulations."

Section 1 contains a subdivision which appellees' argument overlooks, but which the Court had clearly in mind—subsection (4). Subsection (4) of Section 1 requires carriers "to establish reasonable through routes and to make reasonable rules and regulations with respect to their operation" and it has customarily been administered only in conformity with the powers given the Commission over the creation of through routes under Sections 15(3) and 15(4) *Western Pacific Rr. Co. vs. N. W. Pac. Rr. Co.*, 191 I. C. C. 127, 131. There is

"into a through movement" from the Triangle to California. But without transit, certainly, such a conversion is not possible, the through route must remain closed, and the inbound movement must remain intrastate and beyond the Commission's jurisdiction.[29] The Commission's order for transit can only be sustained therefore on the ground that its action, which will not only as a practical matter permit a radical change in the flow of traffic but also transform the legal character of the movements and transfer jurisdiction thereover from state authorities, is merely "incidental" to the operation of a route established for a movement of an entirely different nature.

If this order is sustained on such a theory then the Commission may lawfully require transit on logs as "incidental" to the operation of a through route on rough lumber, transit on rough lumber as "incidental" to a through route on finished lumber, or on furniture, and so on *ad infinitum*, regardless of what happens at the processing point, and the effect of Sections 15(3) and 15(4) will be entirely swept away and the jurisdiction of state authorities will be arrogated by the Commission without compliance with the statutory provisions for assuming such jurisdiction.

The legal implications of such a determination are vastly important not only to railroads like appellant, which depend for their revenues primarily on traffic they originate and which have customarily limited transit on many commodities so as to protect the hauls and revenues which Sections 15(3) and 15(4) have been regarded as designed to protect,[30] but to a proper understanding of the respective spheres within which state and federal regulation are properly operative.

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[29] See footnote 17, *supra*.

[30] In a recent case similar to this one, *Penn. RR. Co. v. U. S.*, 323 U. S. 588, the Court said: "The Commission's authority to grant relief is *bottomed* on Sections 15(3) and 15(4)." (Emphasis supplied.)

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IV.

As Literally Worded, the Order is Void.

Appellees point to the literal wording of the Commission's order (as partially quoted in footnote 2 of their motion) as one merely directing appellant to cease collecting, for traffic stored or milled at Great Falls, "rates exceeding the present joint rates" and as requiring it to establish for traffic stored or milled at Great Falls "rates" measured by such joint rates. It is claimed that the order as so worded cannot be one affirmatively requiring new through routes, but that it is merely a rate order.

The order may have been drawn so that it would be so interpreted. Even so interpreted, however, the order is fatal.

That is because a part of the transportation to which the literal language applies is presently intrastate. Until the separated movements become an interstate unit under some arrangement for continuous carriage the charges on which even such a rate order may operate are unquestionably outside the Commission's jurisdiction.[31]

It is noted that the order incorporates the Commission's report by reference and that at the conclusion of that report it is stated that transit will be required. For the traffic here involved that means that new through routes are ordered established.

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[31] See footnote 17, *supra*. State authorities were not notified of this proceeding under 49 U. S. C., Section 13(3) and did not participate therein.

CONCLUSION

Appellees' motion rests upon the assumed validity of declarations by the Commission, accepted by the Court below, which could not have been made under the undisputed facts but for a view of the law which is challenged by this appeal. The motion to affirm does not meet that challenge. Appellant respectfully asks that the motion be denied so that this Court may, upon the record, pass upon two serious and important questions: (1) to what extent the routing sections of the Act afford protection to originating carriers in respect of traffic stored or processed at points on their lines and (2) to what extent the jurisdiction of state authorities over local commerce may be taken away by requiring a transit which will permit through carriage without a full compliance with the jurisdictional prerequisites to the Commission's assertion of such jurisdiction.

Dated this 5th day of March, 1949.

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA }
COUNTY OF RAMSEY } ss.

LOUIS E. TORINUS, JR., being first duly sworn upon oath, says that he is one of the attorneys for Great Northern Railway Company, the appellant herein, and that on Saturday, the 5th day of March, 1949, he forwarded to Daniel W. Knowlton, Chief Counsel, and J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.; to Philip B. Perlman, Solicitor General of the United States, Herbert A. Bergson, Assistant Attorney General of the United States, and Edward Dumbauld and William J. Hickey, Special Assistants to the Attorney General of the United States, all of Washington, D. C.; and to Samuel Wettrick and Floyd F. Shields, Title and Trust Building, 111 West Washington Street, Chicago, Illinois, attorneys for appellees, General Mills, Inc. and Montana Flour Mills Company, the foregoing reply to motion to affirm by depositing copies thereof, properly enveloped, in the Post Office at St. Paul, Minnesota, with postage prepaid, one copy being addressed to each of the above-named counsel at their post office address as above set forth.

LOUIS E. TORINUS, JR.

Subscribed and sworn to before me
this 5th day of March, 1949.

ALPHA M. MULALLY
Notary Public, Ramsey County, Minn.
My Commission Expires July 11, 1949.
(NOTARIAL SEAL)